

Amsterdam Hosp. v Ali

2007 NY Slip Op 30491(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0115193/2004

Judge: Judith J. Gische

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SCANNED ON 4/3/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JUDITH J. GISCHÉ**

PART _____

Index Number : 115193/2004

AMSTERDAM HOSPITALITY

vs

ALI, SAJID

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

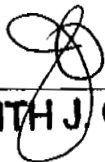
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.
APR 03 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

MAR 27 2007


HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Amsterdam Hospital *et al*

Plaintiffs
-against-

Sajid Ali *et al*

Defendants.

DECISION/ORDER

Index No.: 115193/04

Seq. No.: 003

Hon. Judith J. Gische

J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
N/M (plaintiffs) §§3212, 3217 w/ZS affirm, exhs	1
Def opp w/DFB affirm, exhs	2
ZS reply	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiffs move for summary judgment, or alternatively, permission to discontinue this action "without prejudice". Defendants oppose the motion, especially to the extent that plaintiffs seek that any dismissal be with the right to re-file this action at any time in the future.

Issue has been joined. CPLR §3212. This motion is otherwise timely under the Court of Appeals authority of Brill v. City of New York, 2 NY3d 648 (2004). Plaintiffs' motion will, therefore, be addressed on the merits.

For the reasons set forth below, plaintiffs' motion is granted only to the extent that this court permits this action to be discontinued with prejudice.

Discussion

Summary Judgment

The proponent of a motion for summary judgment has the initial burden of tendering sufficient evidence to eliminate any material issues of fact from the case by evidentiary proof in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden will then shift to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra* 560. The party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.* at 562.

Although plaintiff correctly points out that defendants have not interposed any real opposition to summary judgment, such relief must nonetheless be denied because plaintiffs have failed to set forth a prima facie case.

The complaint alleges five causes of action based upon a common set of factual allegations. The causes of action asserted are for: conversion (First and Second Causes of Action); fraud/deceit (Third Cause of Action); breach of fiduciary duty/unjust enrichment (Fourth Cause of Action); and an accounting (Fifth Cause of Action). The factual allegations are that checks payable to plaintiffs were improperly diverted to bank accounts that were not established by,

or used for the benefit of, plaintiffs.

This motion is supported by what appears to be ledger pages or lists of payments and copies of checks payable to plaintiff. These documents are not, however, self explanatory. What the motion utterly lacks is any sworn statement based on personal knowledge about what actually occurred. The motion is only supported by an attorney's affirmation and the complaint is not verified. This record will not support any determination for summary relief in plaintiff's favor. Stainless, Inc. v. Employers Fire Ins. Co., 69 AD2d 27 (1st dept. 1979) *aff'd* 49 NY2d 924 (1980).

Discontinuance Without Prejudice

Plaintiff claims, without much explanation, that it cannot comply with the court's outstanding discovery orders. It therefore requests that it be able to discontinue this case without prejudice, subject to restoration when and if it can so comply.

This case was commenced by plaintiffs in 2004. They have not provided any reason, let alone a compelling one, why they have been unable to comply with court ordered discovery. Not only has plaintiff failed to produce documents that they were ordered to produce, but no witness has been produced for deposition.

Where a party requests to discontinue a case without prejudice to evade the consequences of an adverse order against them, the court is empowered to discontinue the case with prejudice. Turner v. Ritter, 293 AD2d 404 (1st dept

2002); NBN Broadcasting Inc. v. Sheridan Broadcasting Networks, Inc., 240 AD2d 319 (1st dept. 1997). The disposition may be made notwithstanding that the movant only seeks to discontinue without prejudice.

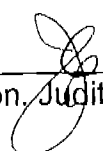
The plaintiff's claims against defendant are extremely serious and import criminal activity. Defendant has the right to know whether these claims are over, or will resurface in the future. Here the basis for the discontinuance is plaintiff's self-professed "inability" to comply with enforceable and extant court orders. Under these circumstances, the failure to comply with discovery would have been the basis for serious discovery sanctions pursuant to CPLR § 3126, had defendant cross moved for such relief.

The court cannot reward plaintiff for its non-compliance by allowing it to re-file this case. Therefore, based upon these circumstances, the court permits discontinuance of this action, but orders that such discontinuance is with prejudice.

Although defendant's answer purports to assert a counterclaim, an examination finds that no separately plead basis for a counterclaim exists. Thus the discontinuance of this case, therefore, finally disposes of this matter. Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
March 27, 2007

So Ordered:


Hon. Judith J. Gische, J.S.C.

FILED

APR 03 2007

COUNTY CLERK'S OFFICE
NEW YORK